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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 152

KALAMAZOO STATIONERY COMPANY, DIVISION OF WESTERN TABLET AND STATIONERY CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 478–487) is reported at 160 F. 2d 465. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 85–92, 46–79) are reported in 66 N. L. R. B. 930.

JURISDICTION

The decree of the court below (R. 477) was entered on March 31, 1947. The petition for a writ of certiorari was filed on June 25, 1947. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTION PRESENTED

Whether the National Labor Relations Board could properly find that petitioner violated Section 8 (1) and (3) of the National Labor Relations Act by discharging two employees because they participated in a strike in protest against conduct by petitioner which they believed discriminatory, when—

(a) only a minority of the employees participated in the strike;

(b) no strike notice had been filed with Federal authorities pursuant to Section 8 of the War Labor Disputes Act;

(c) the discharged employees failed to continue production under the conditions of Section 8 of that Act;

(d) no strike notice had been filed with State authorities pursuant to Michigan law.

Another question urged by petitioner which we do not believe is presented is whether the Board could properly so find if the discharged employees had been representatives of other employees and had urged and incited other employees to strike.

STATUTES INVOLVED

Pertinent provisions of the National Labor Relations Act, the War Labor Disputes Act, and the Michigan State Labor Mediation Act are set forth in the Appendix to the petition for a writ

of certiorari, pp. 20–25. An additional pertinent provision of the War Labor Disputes Act, Section 10, 50 U. S. C. Sec. 1510, is set forth in the Appendix, *infra*, p. 21.

STATEMENT

Upon the usual proceedings under Section 10 of the Act (R. 32–46), the Board, on March 20, 1946, issued its findings of fact, conclusions of law and order (R. 85–92, 46–80). The facts as found by the Board and as shown by the evidence may be summarized as follows:[1]

In June 1944, petitioner's officials learned that the employees were contemplating unionization and immediately took steps to thwart such a movement (R. 50–51; 170–171, 99, 100–104, 293–294). On June 15, 1944, Plant Superintendent De Leeuw (R. 50, 325) summoned employee Harold Hamilton to his office and informed him that he had learned "in a round-about way" that Hamilton and employee Abraham were starting a union in the plant (R. 50; 103, 293–294). A few moments later petitioner's vice-president and general manager, McMahan (R. 51; 104), entered the office and inquired "Harold, how many are tied up in this thing?", adding, "If I thought you were alone I would fire you" (*ibid.*). When Hamilton intimated that many employees were

[1] In the following statement, record references preceding the semicolon are to the Board's findings, including findings of the Trial Examiner which the Board adopted; succeeding references are to the supporting evidence.

interested in the union and that they had formed an organizing committee, McMahan demanded that Hamilton go out into the factory and "bring the organizing committee in here" explaining "when I get done maybe we won't need a union in here" (R. 51; 104).

After consulting that afternoon with employee Abraham and others, Hamilton learned that the employees desired to be represented by the American Federation of Labor, and he thereupon told first De Leeuw and then McMahan that the employees refused to deal individually with the management because they wanted a union to represent them (R. 51–52; 105–106, 150–151, 433, 440). Upon hearing this McMahan threatened "You will be the sorriest guy on earth before I am done" (R. 52; 106).

Hamilton nevertheless took steps to perfect the organization of a union in the plant; he requested local A. F. of L. headquarters to send an organizer to the plant, and typed A. F. of L. pledge forms which he distributed to interested employees in various departments (R. 52; 107, 108, 152–153). Shortly after these forms were circulated among the employees, Superintendent De Leeuw approached Hamilton and announced, "I have been all over the factory and so far as I can learn it is you, you big bastard that started it all. We have been good to you letting you work all the overtime you pleased, but that is out from now on. From now on remember

you don't get any more overtime. Don't expect any more favors" (R. 52; 108, 152). Thereafter, Hamilton was not permitted to work overtime on weekdays, or to come in and work on Saturdays, although he had previously been authorized to do so whenever he desired (R. 52–53; 97, 99, 108, 117, 159, 163, 433–443).

In addition to depriving Hamilton of overtime privileges, petitioner exacted further reprisal by repeatedly diverting him from his regular work as a skilled machinist and assigning him arduous, menial and distasteful tasks (R. 53–54, 59–60, 85; 97, 99, 127, 146, 164–166, 224, 289, 379–380, 410–412, 416–417, 420–421, 433–440). On one occasion Hamilton was escorted to the pressroom by his foreman Pritchard, who announced "I will make you wish you never heard the word 'Union' or else you quit, by God" (R. 54, 59–60; 108, 109, 154). Pritchard thereupon told Hamilton to wash up a press scheduled for overhaul by another employee, and, while Hamilton was engaged in this task, Pritchard called the attention of the pressroom foreman to the spectacle of the "Union big-shot over there, washing up the press" (R. 54, 59–60; 109, 374–379, 176–177).

On or about August 15, 1944, after Hamilton had been subjected to a series of similar indignities, employees Abraham and Commissaris informed De Leeuw that the employees deeply resented petitioner's discriminatory treatment of Hamilton, and that if it continued the employees

might strike, "most anything could happen" (R. 59; 355, 178, 206–207).

Thereafter, Hamilton was reassigned to his normal work in the maintenance department, but was ordered not to leave the machine shop during working hours (R. 60, 85; 118, 377). This order climaxed a series of attempts by petitioner to preclude Hamilton from soliciting union membership in the plant. Although there was no rule against solicitation and employees generally were permitted to engage in conversations as long as work was not interfered with (R. 58–59; 100, 118, 157–159, 163–164, 166, 385–386, 389, 407, 417), petitioner's foremen prevented Hamilton, after his union activies became known, from speaking to employees in other departments and from soliciting union membership in the plant on non-working time (R. 58–59; 115–116, 155–156, 401–402, 405–406).

Petitioner also exerted pressure on other employees to induce them to withdraw from the union movement. Employees were interrogated about their union affiliations and their grievances (R. 54–55, 56, 57–58, 85; 251–252, 254–255, 228–230, 398–399, 174–176); employee Pelkey was warned by his foreman that employees would receive no help from him if the Union came in and that improvements would not be made (R. 54–55; 252–254). Employee Abraham was told by McMahan that a union would do him no good; that the Company could use a man of his ability

in a better job and that Abraham could be promoted "a lot easier" if there were no union in the plant (R. 58; 174–176).

On the basis of the foregoing findings the Board concluded that petitioner had interfered with, restrained and coerced its employees in the exercise of their self-organizational rights and thereby violated Section 8 (1) of the Act (R. 64–65, 85–86).

On September 1, 1944, in the course of a reduction in force, petitioner laid off employee Hamilton (R. 61; 97, 120, 444–454, 462–463). Hamilton was the only employee laid off from the maintenance department (R. 62; 141, 293, 463, 120), and, of the permanent employees who were laid off, Hamilton alone had been in petitioner's employ for a substantial period (R. 62; 463, 120).[2]

[2] The evidence shows that these factors, combined with petitioner's demonstrated hostility to the Union in general and to Hamilton's activities on behalf of the Union in particular (*supra*, pp. 3–7), hostility which had resulted in actual as well as threatened discrimination against him (*supra*, pp. 3–5), and which had provoked a sharp protest from the employees in August (*supra*, pp. 5–6), led the employees to believe that the selection of Hamilton for lay-off was motivated not by bona fide business considerations but rather by petitioner's desire to rid itself of the outstanding union protagonist in the plant (R. 181–182, 123–124, cf. 86). As the court below held (R. 479) "There is substantial evidence that the [petitioner] discouraged the formation of the union, that it discriminated against Hamilton because of his union membership and activity, and that this attitude on its part towards the union activities led to a proposal on the part of the Union to call a strike." The Board, reversing the Trial Examiner, did not find that the lay-off of Hamilton constituted illegal discrimination (R. 86, 61–64).

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On the evening of September 1, following Hamilton's lay-off, the union members met, and, agreeing that petitioner's attacks upon the Union had finally become intolerable, voted to strike on the next working day, September 5 (R. 65; 123–124, 181–182, 232–233). On Sunday, September 3, however, several of the union members, among them Hamilton, Abraham, and Smith, were informed by a representative of another union that, in his opinion, since no strike notice had been filed, the projected strike would be illegal (R. 65; 124–125, 182). They immediately took steps to prevent the strike from occurring. Union members were notified personally and by telephone that the strike would not take place, and on Tuesday morning two union adherents stationed themselves at the plant gates and told the employees to go in to work (R. 65–66; 125, 182–183, 232, 243, 282). Although the strike plan was abandoned and the employees went in to work, their basic grievance had not been eliminated, and during the day rumors that a strike would occur circulated throughout the plant (R. 65–66; 244–245, 271, 281, 344).

That morning employee Abraham, a skilled printer who was normally not subjected to close supervision, was watched and twice criticized for alleged defective workmanship by his foreman George Nason (R. 66; 183–184, 187–188, cf. 232). Abraham, who believed and sought to demonstrate to Nason that his work had not been in the

least deficient, inferred that Nason was "riding" him because of his prominence in the Union's activities, and at lunch time he so informed a group of employees, among whom were Smith and Commissaris (R. 66; 184, 185, 186, 224, 232). After lunch, Nason continued to watch Abraham and to find fault with him (R. 66–67; 187–188, 205–206). When Abraham finally challenged Nason to deny that he was "doing this because of my union activities," Nason replied that although he was entirely neutral, "You boys have got your neck out a mile" (R. 67; 188). Feeling that his suspicions were confirmed by Nason's pointed reference to the precarious status of union members in the plant, Abraham decided to wash up his press and go home (*ibid.*). Commissaris, who worked near Abraham in the bindery and who had lunched with Abraham that day, observed the latter washing his press and asked where he was going (R. 67; 184, 188–189). Abraham replied that he was "fed up with it" and was going home (R. 67; 189). Commissaris turned to the other employees in the department and called, "Come on, folks, we are going out" (*ibid.*). In response to Commissaris' call, the entire bindery department walked out (R. 67; 189–191). Upon leaving the bindery, Abraham went to the spiral department to tell his sister that he was going home and that the bindery had walked out (R. 67; 190, 218–219, 281). As Abraham passed through the box department on his way out of the plant,

Smith saw him and asked where he was going (R. 67; 191, 219–220). Abraham explained that he was going home and that the bindery had walked out (*ibid.*). Smith thereupon punched out and left the plant, as did several other box department employees who had learned by inquiring from Smith the reason for the walk-out (R. 67; 191, 232–234).

Upon leaving the plant, the employees congregated in groups on the parking lot. Shortly thereafter, DeLeeuw and McMahan approached the group in which Abraham and Smith were standing, and DeLeeuw asked why the employees had walked out (R. 68; 191, 233, 234, 310, 345–346). Abraham replied that the employees would return to work only when the Company reinstated the union members who had been laid off (R. 68; 311, 346). McMahan countered "Well, Bill, you aren't coming back to work because you are all through, and that goes for you, too, Smitty [Smith]; you are the fellows who are responsible for pulling these people out of the plant" (R. 68; 311, 346, 192). Abraham and Smith were then told to get their pay checks and were given separation slips, stating that they had been discharged for "misconduct in connection with work" (R. 68; 346, 470, 471, 265). DeLeeuw told the other employees that unless they returned to work by Thursday morning they, too, would be discharged (R. 68; 192, 311, 346).

The strike continued until September 18 (R. 69; 131–132, 138, 139–140, 469). During the course

of the strike Hamilton, on behalf of the Union, offered to have the employees return to work if petitioner would reinstate Abraham, Smith, and himself. (R. 68–69; 129–131). Petitioner refused the offer. Finally, unable to hold out any longer, the employees who had not been discharged or laid off returned to work (R. 69; 120, 131–132, 140–141, 469).

Before the Board petitioner conceded, and the Board found, that petitioner discharged Abraham and Smith because they had engaged in concerted activity for the purpose of mutual aid and protection (R. 43–45, 86–87, 65–71). Petitioner contended that the discharges were justified, however, because a majority of the employees did not participate in the strike; no strike notice was filed pursuant to the War Labor Disputes Act; and no notice was filed as required by the Michigan State Labor Mediation Act (*ibid.*). The Board found no basis in these objections for depriving Abraham and Smith of the protection of the National Labor Relations Act; it found that by discharging these employees, petitioner violated Section 8 (1) and (3) of the Act, and it ordered petitioner to reinstate them with back pay (R. 86–88, 69–71).

On May 16, 1946, the Board filed in the court below a petition to enforce the Board's order (R. 6–13). On March 31, 1947, the court entered its opinion (R. 478–487) in which it enforced the Board's order in full. The court held that the strike in which Abraham and Smith participated

in protest against petitioner's anti-union tactics, was concerted activity protected by Section 7 of the Act. It further held that such protection was not forfeited because only a minority of the employees participated in the strike, or because the strike was not authorized by officials of the labor organization to which the employees belonged (R. 479–482). The court construed Section 8 of the War Labor Disputes Act as imposing a requirement upon employees to "continue production" for thirty days after the inception of a labor dispute and the filing of a notice thereof, but held that the failure of Abraham and Smith to observe this limitation did not warrant denial to them of the benefits of the National Labor Relations Act since the legislative history of the War Labor Disputes Act discloses that Congress did not intend such a result (R. 482–486). Finally, the court held that in the absence of authoritative interpretation of the Michigan State Labor Mediation Act by the state courts it was unable to determine whether or not that Act was intended to authorize the discharge of employees who struck without observing the designated cooling off period (R. 486). The court noted, however, that if such a consequence were intended the state law could not be given effect since it would thereby subtract from the protection accorded against employer reprisal by the National Act to employees who engage in concerted activities (R. 486–487).

ARGUMENT

1. Petitioner's contention (Pet. 10–11), that the strikers were not entitled to the protection of the National Labor Relations Act because only a minority of petitioner's employees were members of the Union and because the strike had not been authorized by an International Representative of the Union, is entirely without merit. Section 2 (3) of the Act preserves the status of "employee" to "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice." Section 7 protects the right of all "employees" "to engage in concerted activities, for the purpose of * * * mutual aid or protection." This statutory guarantee on its face extends to minorities as well as to majorities, and applies whether or not particular concerted activities are authorized by officers of a labor organization. Cf. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–347.

Petitioner's claim of conflict with *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199 (C. C. A. 4) and *National Labor Relations Board* v. *Brashear Freight Lines*, 119 F. 2d 379 (C. C. A. 8) rests upon its erroneous assertion that the objective of the strikers in the instant case, as in those cases, was to usurp the position and prerogatives of exclusive bargaining representative. There is no evidence whatever in the

record that the purpose of the strike was to induce petitioner to recognize or bargain with the Union. On the contrary, the undisputed evidence shows (*supra,* pp. 7–8), as the court below found (R. 479–480), that the strike was provoked by petitioner's repeated acts of hostility toward union members, and by the layoff of Hamilton and others on September 1, an act which the employees believed discriminatory (*supra,* p. 7, n. 2). The strikers demanded only that petitioner reinstate the employees who they believed were being discriminated against and from the very first they offered to abandon the walkout on that condition (*supra,* pp. 10–11). Under these circumstances the cases cited by petitioner have no application. As the Circuit Court of Appeals for the Fourth Circuit itself noted in the *Draper* case (145 F. 2d at 205): "We do not mean to say, of course, that a strike can be called only by a bargaining union, or that less than a majority of employees will not be protected when they go on strike in protection of their rights. See *Firth Carpet Co.* v. *National Labor Relations Board,* 2 Cir., 129 F. 2d 633)."

2. No question of importance to the future administration of the National Labor Relations Act is presented by petitioner's contention (Pet. 12–16) that Abraham and Smith should have been denied relief under that Act because of their alleged violation of the War Labor Disputes Act. The latter Act, a temporary wartime measure, ex-

pired, by its term, on July 1, 1947, six months after the President, on December 31, 1946, proclaimed the termination of hostilities. Proclamation No. 2714, 12 F. R. 1. A determination of the impact of such wartime legislation upon the administration of the National Labor Relations Act would therefore have no widespread significance.

In any event, the Board and the court below correctly deemed controlling on this issue the Congressional judgment that employee violations of Section 8 of the War Labor Disputes Act should not be punished by forfeiture of rights or remedies available under the National Labor Relations Act. The War Labor Disputes Act contains no provision authorizing the withholding of such rights or remedies from employees found to have violated Section 8 of that Act. The legislative history, moreover, indicates that Congress considered and rejected a proposal which would have denied to violators of Section 8 the benefits of the National Labor Relations Act.[3]

[3] The provisions of the War Labor Disputes Act dealing with strikes in privately operated plants (subsequently enacted as Section 8), were introduced into the legislation by the House of Representatives (H. Rep. No. 440, 78th Cong., 1st Sess.). As proposed by the House Committee on Military Affairs and passed by the House, three penalties were to be provided in the case of strikes which occurred prior to the filing of a strike notice. The first rendered any person who violated the section liable for damages in a civil suit to any person injured as a result of violation. The second, which ultimately failed of passage in the Senate, empowered federal district courts to enjoin violations or threatened violations.

The legislative history further establishes that this proposal was rejected because Congress desired to preserve to employees all of their pre-existing rights and remedies under the National Labor Relations Act, and did not deem denial of such rights or remedies an appropriate method of insuring compliance with the provisions of Section 8.[4] Members of the conference committee

The third, which was also rejected by the Senate, provided that violators should forfeit their rights under the National Labor Relations Act. (89 Cong. Rec. 5328–5329, 5382.) Congressman Smith of Virginia, the sponsor of these provisions (89 Cong. Rec. 5326–5327), explained that their purpose was to remove the advantages and protection accorded concerted activities under the Norris-LaGuardia Act and the National Labor Relations Act in cases where such activities occurred in violation of the War Labor Disputes Act (89 Cong. Rec. 5304–5305). Following disagreement by the Senate to the amendments of the House (89 Cong. Rec. 5382), a conference committee of both houses met, revised the bill and recommended its adoption in the form in which it ultimately became law (H. Rep. No. 531, 78th Cong., 1st Sess.). The conferees eliminated those provisions of the House bill which would have deprived violators of Section 8 of their rights and remedies under the National Labor Relations Act and the Norris-LaGuardia Act. H. Rep. No. 531, 78th Cong., 1st Sess., pp. 5, 9. The only enforcement provision which the conferees retained in the War Labor Disputes Act was that subjecting violators to civil liability for damages resulting from wilful failure to perform acts required by Section 8 (c).

[4] There is no basis whatever in the legislative history for petitioner's suggestion (Pet. 14–15) that Congress may have rejected the forfeiture provision merely because it was too broad. If Congress had desired to withdraw any protection under the National Labor Relations Act from violators of the War Labor Disputes Act it would not have lacked apt language to accomplish its precise objective.

which struck the forfeiture provision from the House bill made it clear that the reason for doing so was that the provision would have impinged upon rights and remedies available under the National Labor Relations Act and that Congress wanted no "impairment whatever of those rights" (89 Cong. Rec. 5730, 5732, 5733). After the forfeiture provision was stricken, Congressman Thomason explained on the floor of the House that "Whatever rights the laboring man or the labor unions now have under the National Labor Relations Act, they still have them under this bill" (89 Cong. Rec. 5733).

In refusing to consider the fact of violation of Section 8 of the War Labor Disputes Act as justification for withholding the benefits of the National Labor Relations Act from strikers, the Board and the court below heeded the Congressional determination that such violations should have no impact upon administration of the National Labor Relations Act. They clearly observed the mandate of this Court that "When the legislative purpose is so plain," administrative and judicial bodies "cannot assume to do that which Congress has refused to do" *Southern Steamship Co.* v. *National Labor Relations Board,* 316 U. S. 31, 43–44. There are no contrary decisions.

Denial of the benefits of the National Labor Relations Act to persons whose concerted activ-

ities either in manner or purpose violate other laws is, of course, proper only where Congress has left the Board free to accommodate application of the National Labor Relations Act to protection of another public interest which employees have infringed. Thus, in the *Southern Steamship* case, because the impact of preexisting mutiny laws upon the National Labor Relations Act had never been considered by Congress, the Board was held bound to accommodate its policies to the Congressional objectives embodied in those laws. Again, Congress had never had occasion to consider the impact of age-old policies against violent seizure of property upon the Act's protection of concerted activities. This, therefore, in *National Labor Relations Board* v. *Fansteel Corp.,* 306 U. S. 240, was held to be a task for the Board.

Where, on the other hand, Congress enacts legislation with the National Labor Relations Act in mind, as it did in the case of the Emergency Price Control Act of 1942 (56 Stat. 23, 24, 50 U. S. C. App., Supp. V, 901 (a), and the War Labor Disputes Act, the Board is bound to give to the new legislation the effect intended by Congress. Compare, *Matter of American News Co., Inc.,* 55 N. L. R. B. 1302, 1308–1309. The refusal of Congress, after due consideration, to provide in the War Labor Disputes Act that the Board's administration of the National Labor Relations Act should be affected by the newly adopted policies stands in

sharp contrast to the express provision to that effect in the Emergency Price Control Act, and demonstrates the propriety of the Board's refusal to restrict the benefits of the National Labor Relations Act contrary to the intention of Congress.

3. Petitioner's contention (Pet. 18–19), that an application of the Michigan State Labor Mediation Act which would deny to employees who engaged in concerted activities during the cooling-off period the protection against employer reprisal accorded under the National Labor Relations Act would not be in conflict with that Act, is frivolous. As the court below pointed out (R. 487), "The Federal Act does not require the giving of notice of a pending dispute followed by a cooling-off period." Clearly the imposition of such a requirement as a condition to the exercise of rights conferred under the National Act would subtract from the protection accorded concerted activities by Congress. In refusing so to apply the Michigan Act, the Board and the court below followed the controlling decisions of this Court. *Hill* v. *Florida,* 325 U. S. 538, 539; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740, 750–751. Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* No. 55, October Term, 1946, decided April 7, 1947; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. 2d 874, 885–886 (C. C. A. 1), certiorari denied, 313 U. S. 595. There are no contrary holdings.

4. As the facts set forth in the Statement show (*supra,* pp. 8–11), and as the Board found (R. 70), Abraham and Smith did not urge or incite other employees to strike. Petitioner neither contended nor established before the Board that they were representatives of other employees. Therefore, the question urged by petitioner (Pet. 8), insofar as it assumes that Abraham and Smith urged and incited other employees to strike, and were representatives of other employees, is not presented.

CONCLUSION

The decision below is clearly correct in all respects here challenged, and presents no conflict of decisions. Moreover, since the War Labor Disputes Act has expired, the question concerning the applicability of that Act in such circumstances as here presented has no importance for the future. The petition for a writ of certiorari should, therefore, be denied.

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APPENDIX

Section 10 of the War Labor Disputes Act, (57 Stat. 163, 50 U. S. C. App., Supp. V, 1501, *et seq.*) provides as follows:

> Except as to offenses committed prior to such date, the provisions of this Act * * * shall cease to be effective at the end of six months following the termination of hostilities in the present war, as proclaimed by the President * * *

U. S. GOVERNMENT PRINTING OFFICE: 1947